



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/970,443	10/02/2001	Donald O. Castell	18596-004	9610

28286 7590 03/09/2004

IP PATENTS
FAEGRE & BENSON LLP
1900 FIFTEENTH STREET
BOULDER, CO 80302

EXAMINER

NASSER, ROBERT L

ART UNIT PAPER NUMBER

3736

DATE MAILED: 03/09/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/970,443

Applicant(s)

CASTELL ET AL.

Examiner

Robert L. Nasser

Art Unit

3736

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 04 December 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-74 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-27, 35-71, 74 is/are rejected.
- 7) ☒ Claim(s) 28-34, 72 and 73 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-22, 25-27, 35-68, 70, 71, and 74 are rejected under 35 U.S.C. 102(b) as being anticipated by the Shaker et al article entitled "Esophagopharyngeal Distribution of Refluxed Gastric Acid in Patients with Reflux Laryngitis. Shaker et al discloses two probes, a first one with a single pH sensor adapted to be positioned at a position 5 cm above the LES and a second probe with a second and third pH sensor 10 cm apart (which is "about 7 cm") being configured to straddle the UES. The device further has a recorder, i.e. the computer, which receives the data from two data loggers for analysis. The computer correlates the two signals with respect to each other and to a user inputted marker signal used to mark some of the claimed events. It has the remaining claim features, noting that the distances in Shaker are "about" the same as the claimed distances. The examiner notes that when the data loggers are connected to the computer, the computer integratively receives the signals, in as much as applicant has not defined integratively receives. Therefore, using the broadest reasonable interpretation, it is the examiner's position that Shaker anticipates the claim feature.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and

Art Unit: 3736

the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 23, 24, and 69 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shaker et al in view of Reichstein. Shaker et al does not have the stabilizing element. Reichstein shows an alternate pH probe that has such a stabilizing element. Hence, it would have been obvious to modify Shaker to configure the sensor to have such a stabilizing element, to avoid movement during measurement.

Claims 28-34 and 72-73 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Claims 28-34 define over the art in that none of the art shows an adjustable element to which the probes are connected. Claims 72 and 73 define over the art in that none of the art of record teaches taking up the slack, as recited. Applicant's arguments filed December 4, 2003 have been fully considered but they are not persuasive.

Applicant has argued that Shaker uses two data loggers that do not correlate the signals. The examiner agrees, but notes that the data from the loggers is then transferred to a computer, which does correlate the signals.

Applicant has further asserted that the computer does not correlate the data from the two data loggers on one time scale. The examiner disagrees. The two probes were used to make measurements for 22 hours after the manometric measurements. As such, data loggers record measurements over the same time period. When inputted to the computer then, the data are easily correlated with each other over the time period of measurement, in a single time scale.

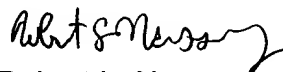
Applicant has asserted that there is no teaching in Shaker that both loggers are connected to the computer. The examiner assumes applicant means that both loggers are not connected at the same time, as it is clear that data from both data loggers is transferred to the computer. The examiner further notes that even if the data loggers were connected sequentially, the computer would still correlate the signals and be responsive to signals from both probes.

Applicant has asserted that systems like Shaker are prone to some error and that applicant's invention is more accurate. While this may or may not be true, it is the examiner's position that the Shaker reference meets the claim language and whatever error there might be does not render its system inoperative. Accordingly, this argument fails.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert L. Nasser whose telephone number is (703) 308-3251. The examiner can normally be reached on Mon-Fri, variable hours.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Max Hindenburg can be reached on (703) 308-3130. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Robert L. Nasser
Primary Examiner
Art Unit 3736

RLN
March 5, 2004

ROBERT L. NASSER
PRIMARY EXAMINER